**APPENDIX A**

[SEAL] CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
STATE OF INDIANA
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Cause Number: 37A03-0004-CV-00140
Lower Court Number: 37C019004CT88

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GRAND TRUNK WESTERN RAILWAY CO.

v.

KAPITAN, TAMERA LEE

---

SEAN GRAHAM-KENYON
KONOPA REAGAN & KENYON PC
P.O. Box 11237
South Bend, IN 46634-0237

You are hereby notified that the Supreme Court has on this day 11/14/01

This matter comes before the Indiana Supreme Court on a petition to transfer from a decision of the Court of Appeals, pursuant to Indiana Appellate Rule 57. The Court has reviewed the decision of the Court of Appeals, the record of proceedings, the briefs which were filed in the Court of Appeals, and the materials which were submitted in connection with the request to transfer jurisdiction. Each participating member of the Court has voted on the case. Each participating member of the Court has had the

opportunity to voice that Justices [sic] views on the appeal in conference with the other Justices.

Being duly advised, the Court now denies the Appellant's petition to transfer.

RANDALL T. SHEPARD
Chief Justice

All Justices Concur.

Witness my name and the seal of said Court, this 14th day of November, 2001.

/s/ Brian Bishop
Clerk Supreme Court, Court of Appeals, and Tax Court

**APPENDIX B**

IN THE COURT OF APPEALS OF INDIANA

[Filed Apr. 6, 2001]

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ATTORNEYS FOR APPELLANT:

SEAN E. KENYON
ROBERT J. KONOPA
CLAIRE KONOPA AIGOTTI
KONOPA & MURPHY, P.C.
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

KENNETH J. ALLEN
JAMES E. BRAMMER
KENNETH J. ALLEN & ASSOCIATES, P.C.
Valparaiso, Indiana

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No. 37A03-0004-CV-140

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GRAND TRUNK WESTERN RAILWAY COMPANY,
A corporation,
*Appellant-Defendant,*
vs.

TAMERA LEE KAPITAN, special
Administratrix of the Estate of RUDOLPH J. KAPITAN,
*Appellee-Plaintiff.*

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APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable E. Duane Daugherty, Judge
Cause No. 37C01-9004-CT-88

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April 6, 2001

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MEMORANDUM DECISION-
NOT FOR PUBLICATION

BAILEY, *Judge*

Case Summary

Appellant-Defendant Grand Trunk Western Railway Company ("Grand Trunk") appeals a jury verdict in favor of Appellee-Plaintiff Tamara Lee Kapitan ("Kapitan Estate"), special administratrix of the estate of Rudolph J. Kapitan ("Kapitan"). We affirm.

Issues

Grand Trunk raises four issues on appeal, which we consolidate and restate as follows:

I. Whether Kapitan's state tort law claim is preempted by federal law;

II. Whether the trial court abused its discretion when it allowed Kapitan's expert witnesses, Dr. William Berg ("Berg") and Dr. E. James Jennings ("Jennings"), to testify.

Facts and Procedural History

On November 6, 1988, a Grand Trunk train was traveling westbound as it approached the Hendricks Street crossing ("Crossing"), in Merrillville, Indiana. (R. 1642, 1661.) At the same time, Kapitan approached the Crossing by car. (R. 1642.) The train and Kapitan's car collided. (R. 1642.) Kapitan died as a result of the collision.

On December 2, 1989, Kapitan's Estate filed suit against Grand Trunk and its train conductor Richard Enos ("Enos"). (R. 15-17.) Included in the Kapitan Estate Complaint were allegations that Grand Trunk and Enos failed to provide adequate warning devices at the Crossing. (R. 16.) In their Answer, Grand Trunk and Enos denied any negligence and further asserted that the Federal Rail Safety Act and Highway Safety Act preempted claims regarding the Crossing's level of protection. (R. 18-20.)

On November 28, 1994, Grand Trunk and Enos filed a Motion for Partial Summary Judgment on Kapitan's claim that they failed to provide sufficient warning devices at the Crossing, including flashing lights and gates. (R. 22-23.) On July 13, 1995, the trial court granted summary judgment, finding that Kapitan's claim of inadequate warning devices at the Crossing was a "state law claim . . . preempted by federal law, and therefore said claim must fail." (R. 219.) Thereafter, Kapitan brought an interlocutory appeal. (R. 221-22.) On April 11, 1997, in a memorandum opinion, this Court reversed the trial court's decision as to preemption, writing in part that "[b]ecause the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997).

Thereafter, a jury trial was scheduled for January 31, 2000. On January 24, 2000, the trial court heard oral arguments regarding several pre-trial motions. Included in these motions were Grand Trunk's motion for a continuance of the trial pending the United States Supreme Court's decision in *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed. 374 (2000), and Grand Trunk's motions to exclude, or in the alternative, limit the expert testimony of Berg and Jennings. (R. 254-56, 575-577, 621-23). In addition, Grand Trunk filed a separate motion in limine to bar evidence of reports of other accidents that occurred at the Crossing prior to Kapitan's accident. (R. 355-60.) The trial court denied Grand Trunk's motions and their renewed objections at trial. (R. 617, 741-46, 1047.)

On February 3, 2000, the jury returned a verdict in favor of Kapitan, with total damages in the sum of $5,109,480.00, which, multiplied by the jury's determination that Grand Trunk was fifty percent at fault, resulted in a verdict of $2,554,740.00 in favor of Kapitan. Additional facts appear as needed.

## Discussion and Decision

### I. *Federal Preemption*

#### A. *Rule of Law*

The preemption doctrine is founded upon the Supremacy Clause of Article Six of the United States Constitution, which invalidates those state laws that interfere with, or are contrary to federal law. U.S. Const. Art. VI, Cl. 2; *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985).

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

*Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (citations omitted). "The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369.

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if the law actually conflicts with federal law, or if federal law so thoroughly

> occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotations and citations omitted).

B. *Analysis*

The express preemption provision of the Federal Railroad Safety Act of 1970 ("FRSA"), reads as follows:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. Following the enactment of the Highway Safety Act of 1973, § 203, 87 Stat. 283, which in turn created the Federal Railway-Highway Crossings Program ("Crossings Program"), 23 U.S.C. § 130, several regulations were promulgated to implement the Crossings Program. Included in these regulations are sections that address the adequacy of warning devices installed under the Crossings Program. Specifically, 23 C.F.R. §§ 646.214(b)(3) and (4) provide as follows:

> (3)(i) adequate warning devices, under . . . any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences. Or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of [the Federal Highway Administration] FHWA.

Here, on August 1, 1988, the FHWA approved the Hendricks Street Crossing upgrade project as previously agreed to between the town of Merrillville and Grand Trunk, and committed federal funds to pay for the project. In October of 1988 the Crossing was closed, as a contractor hired by Merrillville began construction on the approaches to the Crossing, striped the pavement, and installed pavement markings. Additionally, the Merrillville Street Department placed two new "Stop Ahead" signs, two "Tracks" signs, two "Stop" signs and reinstalled the "Railroad Crossing" signs. During this period of time Grand Trunk also poured foundations for the gates and flashers. The Crossing was reopened in November. However, at the time of Kapitan's accident the flashers and gates were not yet operational. The flashing lights and gates were installed by December 1, 1988.

In *Norfolk Southern Railway Company v. Shanklin*, the Supreme Court granted certiorari

> to resolve a conflict among the Courts of Appeals as to whether the [Federal Railroad Safety Act], by virtue of 23 C.F.R. §§ (b)(3) and (4) (1999), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of the devices.

120 S.Ct. 1467, 1473. There, the case involved an action for damages against a railroad for failure to maintain adequate warning devices at a grade crossing in western Tennessee. The respondent claimed that the warning signs posted at the crossing, which had been installed using federal funds, were insufficient to warn motorists of the danger of passing trains. The Supreme Court held as follows:

> [O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained."

*Id.* at 1474 (quoting *CSX v. Easterwood*, 507 U.S. 658, 670 (1993)) (emphasis added). Accordingly, the Supreme Court ruled that since the FHWA had "approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claim." *Id.* at 1477.

In our previous unpublished decision of *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997) we held that "[b]ecause the federally approved warning devices were *not yet operational* at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this

issue." (Emphasis added.) This language is consistent with the Supreme Court's opinion in *Shanklin*. Accordingly, we affirm our previous ruling that Kapitan's state tort claim was not preempted by federal regulations.

## II. *Expert Testimony*

### A. *Standard of Review*

The proponent of expert testimony has the burden of proving the reliability of the principles upon which the expert's testimony rests. *McGrew v. State*, 682 N.E.2d 1289, 1290 (Ind. 1997). In determining whether expert testimony is reliable, the trial court assumes the function of "gatekeeper" in ensuring that an expert's testimony rests on a reliable foundation and is relevant to the issue at hand. *Wallace v. Meadow Acres Manufactured Housing , Inc.*, 730 N.E.2d 809, 812 (Ind. Ct. App. 2000) (quoting *Hottinger v. Truegreen Corp.*, 665 N.E.2d 593, 596 (Ind. Ct. App. 1996)). The trial court's determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion, and will be reversed only for an abuse of that discretion. *Sears Roebuck and Co. v. Manuilov*, WL 51680 at 6 (Ind. 2001).

### B. *Rule of Law*

Indiana Rule of Evidence 702 provides as follows:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

This Rule was not intended to interpose an unnecessarily burdensome procedure methodology for trial courts. *Manuilov*, WL 51806 at 7.

> By requiring trial courts to be satisfied that expert opinions will assist the fact-finder and that the underlying scientific principles are reliable, Rule 702 guides the admission of expert scientific testimony. Although it authorizes the exclusion of purported scientific evidence when the trial court finds that it is based on unreliable principles, the adoption of Rule 702 reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence.

*Id.* As only reliable evidence will assist the trier of fact, reliability is a threshold issue under Indiana Evidence Rule 702 analysis. *Wallace*, 730 N.E.2d at 813.

> Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact.

*Manuilov*, WL 51806 at 7.

C. *Analysis of Expert Testimony Offered by Jennings and Berg*

1. Jennings—Future Earnings

Jennings testified regarding the economic loss to the Kapitan Estate that resulted from the death of Kapitan. Grand Trunk contends that Jennings's testimony should have been barred or limited because "Jennings failed to adhere to facts and procedure reasonably relied upon by economists." Appellant's Brief at 15. Specifically, Grand Trunk argues that to properly arrive at Kapitan's lost future earnings, Jennings needed to evaluate the Kapitan family's used car business. Appellant's Brief at 16. Jennings did not evaluate Kapitan Motors. Instead, to arrive at a projected economic loss figure, Jennings con-

sidered Kapitan's history of wage income, business investment and household services. Jennings determined that the total value of losses was $17,577,026.85. This figure was reduced to $14,630,448.16 after adjustments were made for taxes and personal consumption.

The following is an excerpted summary of Jennings's "Report Evaluating the Economic Loss to the Estate of Rudolph Kapitan[,]" which was attached to Grand Trunk's motions to bar, or in the alternative, to limit Jennings testimony at trial:

> Background
>
> Rudolph Kapitan, was born on May 3, 1958 and was injured and died on November 6, 1988. He was married to Tamera and worked for the family used car business for approximately eight years before his death. Had he not died he could have provided his family with wage income, profit from his business investment and household services. As a consequence of his death, his family will either lose these benefits or must pay someone else to provide them.
>
> Foundation
>
> A man of Rudolph Kapitan's age has a work expectancy of sixty-one and one-half (61.5) years. . . . . If this figure is adjusted proportionately to life expectancy increases, the worklife is nearly sixty-five (65) years. . . .
>
> Rudolph Kapitan is projected to have worked, for the remainder of his active worklife, in the same occupation and at the same level he held at the time of his injury, with one exception. At the time of his death, his family had begun planning for a buyout of the firm on his part. Wage growth projections are based upon two sources. The wage base is founded upon the actual recent experience of Mr. Kapitan prior to his death. Since only

limited data regarding Mr. Kapitan['s] past wage was available the pattern of growth in the used car sales sector of the economy was [also] analyzed.

. . . .

The family corporation (KMI) had experienced substantial growth over the last six years of Rudolph's life.

. . . .

At the time of his death, Rudolph Kapitan had a life expectancy of 47.44 additional years according to a combination of sources that take into consideration age, gender, race and work status.

In order to compensate Rudolph Kapitan and his estate for the losses that have been or will be incurred as a result of his injury [$17,577,026.85] must be set aside today. . . .

Adjustments: Taxes and Personal Consumption

[After subtracting the "Net Tax Impact" and "Personal Consumption" that resulted from Kapitan's death] the net economic loss to the Kapitan estate, is $14,630,448.16.

(R. 633-637, 690-94).

Grand Trunk countered, by way of an affidavit, cross-examination and argument.

The affidavit of Dr. James A. Bernard provided in relevant part as follows:

6. In valuing the estimated income lost to an estate which involves the potential lost profits of a small business, one of the following methods is considered valid and acceptable by forensic economists, CPA's, and financial analysts: 1. Capitalized Earnings Stream; 2. Actual Sale of Ownership Interest; 3. Business Sale

> Pricing. None of these methods is used by Dr. Jennings in coming to his conclusions. Dr. Jennings used projected sales growth of used cars but not sales of used car businesses and his analysis ignores the "comparable" sales methodology.
>
> 7. In addition, his chosen discount (capitalization) vehicle is inappropriate and not valid[.]
>
> 8. As Dr. Jennings' only method of analysis of Kapitan Motors, Inc. is projected sales growth discounted at Treasury Security rates and since he does not use an acceptable methodology for valuing lost earnings, his conclusion as to the income lost to the estate is invalid, inaccurate and unreliable.
>
> 9. Dr. Jennings' opinion is not based on adequate facts, data or established methodology.

(R. 639.) Jennings did not contest the fact that he did not evaluate the family-owned business, nor that he was not qualified to do so. Instead, Jennings asserted that he relied on facts and methodology customarily used by economists to predict Kapitan's future earnings. That is, a methodology that factored in such figures as Kapitan's salary at death (approximately $66,000.00), his working-life expectancy (47.44 additional years), the growth rate of used car sales in Indiana (10.2 percent), and the value of Kapitan's household services. These figures, which included some specific to Kapitan and others that were averages regarding the used car business in Indiana, were derived from tax forms, government statistics, and published studies. Jennings [sic] methodology, simplified, used these limited, but supported past figures, to predict the future lost earnings to the Kapitan Estate as a result of Kapitan's death.

It is difficult for this Court to discern how an *accurate* projected lost earnings figure can be determined for an employee of a family owned business without an evaluation

of *that* business. Nevertheless, we find this concern to be a matter affecting weight and credibility, rather than one questioning Jennings's scientific standards. Grand Trunk effectively addressed this issue on cross-examination and as such it was properly placed before the jury where it's weight and impact on credibility could be determined. *See Manuilov*, WL 51806 at 7. Given our supreme court's "intent to liberalize, rather than to constrict, the admission of reliable scientific evidence[,]" *see Manuilov*, WL 51806 at 7, the broad discretion due the trial court on these matters, and Jennings's supporting testimony regarding his methodology, we do not find that the trial court abused its discretion by permitting Jennings to testify.

2. Berg—Hazardous Hendricks Street Crossing

Berg testified as to both the general characteristics of hazardous railroad crossings and the specific hazards presented by the Hendricks Street Crossing. Grand Trunk argues that "Berg relied on irrelevant evidence[,]" "failed to adhere to facts and procedure reasonably relied on by experts in his field[,]" and "was impermissibly allowed to fix the duties of the parties." Appellant's Brief at 20-21. We disagree.

Grand Trunk bases its' "irrelevant evidence" argument on the fact that Berg's testimony focused on the conditions and accident history at the Crossing prior to the improvements made in October of 1988, and thus prior to Kapitan's accident. Grand Trunk contends that Berg's testimony did not include prior *similar* accidents, and therefore was not relevant. Grand Trunk relies upon *Indiana State Highway Commission v. Fair*, 423 N.E.2d 738, 740 (Ind. Ct. App. 1981), where this Court adopted the language of 40 Am.Jur.2d *Highways, Streets, and Bridges* § 601 at 79 (1968), and stated:

> Evidence of other accidents is not properly admissible in any action to recover for injuries sustained as a result of

> a highway defect or obstruction where it is not shown that the other accidents occurred from *the same cause*, at the same place, and *under substantially similar conditions*.

However, the admission of prior accidents of similar characteristics under the same circumstances to prove the existence of a dangerous condition and notice thereof is a matter left to the discretion of the trial court. *Pederson v. White*, 511 N.E.2d 460, 465 (Ind. Ct. App. 1987). Moreover, "it is appropriate to relax the requirement of similar conditions when the offer of proof is to show notice of the dangerous character of the crossing rather than defendant's negligence." *Gardner v. Southern Railway Systems*, 675 F.2d 949, 952 (7th Cir. 1982).

Here, Berg testified to the number of accidents that took place at the Crossing from 1974 to 1987 and the significance of the frequency of those accidents as it related to his determination that the Crossing was hazardous. This testimony was relevant to show that Grand Trunk knew of the hazardous conditions at the Crossing. Furthermore, any prejudice that may have resulted from the incorrect inference that the Crossing presented the same hazards at the time of Kapitan's accident was effectively dispelled on cross-examination, where Grand Trunk established that various improvements had been completed in the month prior to Kapitan's death, and after the time period referenced by Berg. Berg's testimony remained reliable and assisted the jury.

Next, Grand Trunk asserts that there were inconsistencies in Berg's methodology. Specifically, Grand Trunk casts doubt on Berg's factoring of the hump that was removed underneath the Crossing. While testifying as an expert in a separate railway case Berg testified that a "hump roadway profile" contributed to a crossing being extra-hazardous. *Bickley v. Norfolk Western Railway Co.*, 60 F.Supp.2d 732,

736 (N.D. Ohio 1998). Yet, here Berg testified that "when you change the grade, you now encourage and facilitate higher approach speeds. Now, that can be a problem if you don't have adequate signals, which you didn't have at this crossing." (R. 1135.) Subsequently, on cross-examination, Berg testified that "you want relatively flat approaches [to crossings]." (R. 1166.) The resolution of any perceived inconsistencies is within the province of the jury.

Lastly, Grand Trunk asserts that Berg was "impermissibly allowed to fix the duties of the parties." Appellant's Brief at 21. Specifically, Grand Trunk complains that Berg created an inference that it was responsible for anticipating that drivers would ignore STOP signs. However, the record does not support this allegation.

> Q: [Grand Trunk] So motorists then, if I understand what you're saying, could simply not comply with [a STOP sign] and didn't have to take responsibility for the consequences?
>
> A: [Berg] No, I'm not saying that at all. What I'm talking about as an engineer is, what we want is good behavior in whatever way we can achieve it. And if I put in the wrong traffic control device, it's not going to get . . . elicit good behavior, then I've got a problem. And so the issue is the failure to do the proper engineering so that drivers would have had a credible device that gave them the information they needed when they need it.

(R. 1275.) Berg's testimony did not "fix" the duties of the parties. For the above reasons the trial courts decision to admit Berg's testimony was not an abuse of discretion.

Affirmed.

RILEY, J., and BARNES, J., concur.

**APPENDIX C**

IN THE COURT OF APPEALS OF INDIANA

[Filed Jun 5, 1997]

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ATTORNEY FOR APPELLANT:

KENNETH J. ALLEN
BRETT E. OSBORNE
KENNETH J. ALLEN & ASSOCIATES
Valparaiso, Indiana

ATTORNEY FOR APPELLEE:

ROBERT G. DEVETSKI
KONOPA & MURPHY
South Bend, Indiana

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No. 37A03-9511-CV-364

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TAMERA LEE KAPITAN, Special
Administratrix of the Estate of RUDOLPH J. KAPITAN,
*Appellant-Plaintiff*,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY,
a Corporation, and RICHARD ENOS,
*Appellees-Defendants*.

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APPEAL FROM THE CIRCUIT COURT
OF JASPER COUNTY
The Honorable E. Duane Daugherty, Judge
Cause No. 37C01-9004-CT-88

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April 11, 1997

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MEMORANDUM DECISION-
NOT FOR PUBLICATION

STATON, *Judge*

The administratrix of the estate of Rudolph J. Kapitan appeals the trial court's grant of summary judgment to the Grand Trunk Western Railway on the grounds that the estate's claim that the railroad negligently failed to place adequate warning devices at the train crossing was preempted by federal law. The railroad cross appeals the denial of its motion for summary judgment on the estate's claim that the railroad was negligent in failing to maintain an unobstructed view of the tracks for motorist. Two issues are presented:

I. Was Kapitan's claim for failure to place adequate warnings at the train crossing preempted by federal law.

II. Was summary judgment improperly denied against Kapitan's claim that the view of the tracks was obstructed.

We affirm in part and reverse in part.

On November 6, 1988, Kapitan was killed when his car was struck by a Grand Trunk Western Railway train at a crossing in Merrillville. Prior to Kapitan's collision, the railroad received federal approval and funding for an upgrade of the warning devices at that crossing, but the warning devices were not operational until several months after the accident.

I.

*Preemption*

After the trial court's grant of summary judgment in this case, we ruled that Indiana common law tort claims charging a railroad with negligence for inadequate warning devices at a railroad crossing are not preempted by the Federal Railway Safety Act of 1970, 49 U.S.C. § 20101 *et. seq.*, and specifically 23 C.F.R. § 646.214(b)3 and 4, until federally

authorized warning devices are actually operating. *Estate of Martin v. Consol. Rail Corp.*, 667 N.E.2d 219, 222 (Ind. Ct. App. 1996). In *Martin* we approved the Seventh Circuit's reasoning in *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 183 (7th Cir. 1995), noting that any other interpretation would leave the public unprotected during the time between approval of a project to install federally authorized warning devices and actual installation of the warning devices. Because the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue. *Martin, supra.*

II.

*Obstructed View*

Grand Trunk appeals the trial court's denial of its motion for summary judgment on Kapitan's claim that the view of its tracks was not unobstructed for the 1,500 feet required by IND. CODE § 8-6-7.6-1 (1972).

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). The burden is on the moving party to prove there are no genuine issues of material fact and it is entitled to judgment as a matter of law. When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party. *Reed v. Luzny*, 627 N.E.2d 1362, 1363 (Ind. Ct. App. 1994), *reh. denied, trans. denied.*

Kapitan and Grand Trunk present conflicting affidavits as to whether the view of the tracks was clear within the distance prescribed by law.

Kapitan presented an affidavit stating that the view was obstructed. Grand Trunk attacks Kapitan's affidavit as

insufficient to create a genuine factual issue because the affiant did not state from exactly what spot he was unable to view the tracks.

Grand Trunk presented an affidavit stating that the view was unobstructed. Kapitan attacks Grand Trunk's affidavit as defective because its view of the tracks was from an elevated position.

The conflicting evidence, and arguments as to the weight which should be afforded to the evidence, leaves a genuine factual issue to be determined at trial as to whether the view of the tracks was unobstructed within the distance prescribed by law. The trial court's denial of summary judgment as to the obstructed view claim is therefore affirmed.

Affirmed in part, reversed in part.

GARRARD, J., and NAJAM, J., concur.

**APPENDIX D**

STATE OF INDIANA
COUNTY OF JASPER
JASPER CIRCUIT COURT

[Filed Jul 13, 1995]

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Cause No. 37C01-9004-CT-088

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TAMERA LEE KAPITAN, Special
Administratrix of the Estate of Rudolph J. Kapitan,
*Plaintiff*,

-vs-

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Corporation, and RICHARD ENOS,
*Defendants*.

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ORDER

The Plaintiff having heretofore filed her Petition for Interlocutory Appeal, and the Defendants having filed their objection thereto, the Court now finds that said petition should be determined without hearing thereon.

The Court, having reviewed the Plaintiff's petition and the Defendants' objection, and being duly advised in the premises, now finds that said petition should be overruled and denied.

IT IS THEREFORE ORDERED AND DECREED by the Court that the Plaintiff's Petition for Interlocutory Appeal is hereby overruled and denied.

ORDERED THIS 14TH DAY OF JULY, 1995.

/s/ E. Duane Daugherty
E. DUANE DAUGHERTY, Judge
Jasper Circuit Court

## APPENDIX E

STATE OF INDIANA
COUNTY OF JASPER
JASPER CIRCUIT COURT

[Filed Jul 13, 1995]

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Cause No. 37C01-9004-CT-088

---

TAMERA LEE KAPITAN, Special
Administratrix of the Estate of
Rudolph J. Kapitan,
*Plaintiff,*

-vs-

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Corporation, and RICHARD ENOS,
*Defendants.*

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ORDER

This matter came on for hearing on the Defendants' Motion for Summary Judgment. Thereafter the Court took the matter under advisement and, having reviewed the same and being duly advised in the premises, now finds as follows:

The Plaintiff, in her Complaint, has alleged that the Defendants were negligent in failing to sound the train whistle, failing to have a "clear view" of the railroad crossing, and failing to have proper warning devices at said crossing, and that as a result thereof, the Plaintiff has sustained damages.

The Defendants have conceded that there is an issue of fact with regards to whether or not the train failed to sound the train whistle and, therefore the Defendants are seeking partial summary judgment on the Plaintiff's other two allegations.

With regards to the Plaintiff's claim that the Defendants were negligent for failure to have a "clear view" of the railroad crossing, the Court finds that the Plaintiff has submitted the affidavit of Ricky Lee Wise in opposition to the Defendants' allegations. The Defendants have argued that said affidavit is insufficient to create an issue of fact for reason that the affiant indicated that there was not a clear view of said grade crossing, however he was not specific as to the location where the view of oncoming trains was obstructed.

The Court further finds that while the Defendants' argument has some merit, the Court, in determining a motion for summary judgment, cannot weigh the evidence, but must determine if there is conflicting evidence of probative value. Further, all inferences which can be drawn from the facts must be drawn in favor of the non-moving party.

The Court finds that the inference which can be drawn from said affidavit is that the view of the railroad crossing was not clear within the distance prescribed by law.

The Court therefore finds that there is a material issue of fact as to whether or not the Defendants were negligent in failing to have a "clear view" of the railroad crossing, and that therefore the Defendants are not entitled to a partial summary judgment on said issue.

With regards to the issue of whether or not the Defendants were negligent in failing to have proper warning devices at the railroad crossing, the Court finds the uncontested facts to be as follows:

1. On November 6, 1988, the Grand Trunk Western Railroad Company owned and maintained a railroad right-of-way which intersects with Hendricks Street in the Town of Merrillville, Lake County, Indiana, hereinafter referred to as the Hendricks Street crossing.

2. At approximately 7:45 a.m. on November 6, 1988, the Grand Trunk Western Railroad Company owned freight train #371, which train was being operated by Richard Enos, who was the engineer of said train. Further, at said time, train #371 was travelling in a westerly direction over the Hendricks Street crossing.

3. At said time and place, Rudolph J. Kapitan was operating a motor vehicle in a southerly direction on Hendricks Street at its intersection with the Grand Trunk railroad track.

4. At said time and place, a collision occurred between the lead engine of train #371 and the vehicle operated by Rudolph J. Kapitan, which collision resulted in the death of Mr. Kapitan.

5. On September 9, 1986, engineering estimates concerning the placement of flashing lights and gates at the Hendricks Street crossing were performed by Grand Trunk personnel for the purpose of obtaining federal approval for an improvement project at said crossing.

6. On January 20, 1988, a proposed agreement for a federally-funded grade crossing improvement project for the Hendricks Street crossing was sent to Grand Trunk for its approval.

7. By July 12, 1988, the State of Indiana approved the agreement to upgrade the Hendricks Street crossing.

8. On August 1, 1988, the Federal Highway Administration approved the Hendricks Street crossing upgrade project, obligating federal funds to pay for the project.

9. On August 26, 1988, the State of Indiana, pursuant to authorization from the Federal Highway Administration, notified the Grand Trunk to assign a work order for the Hendricks Street crossing project and to begin purchasing the necessary materials for implementing the project.

10. On or before December 1, 1988, the flashing lights and gates were installed at the Hendricks Street crossing, but the project was completed and payments made after the collision occurred on November 6, 1988.

There is no dispute that the Federal Railroad Safety Act of 1970 has preempted the Indiana Tort Law with regards to the issue of the warning devices at the Hendricks Street crossing. However, based upon the uncontested facts, the issue for the Court's determination is whether federal law preempted Indiana tort law when the Federal Highway Administration approved the Hendricks Street crossing improvement project and obligated federal funds to pay for the same in August, 1988, or whether the preemption occurred on or about December 1, 1988, when the project was completed and flashing lights and gates installed.

This issue of preemption was decided by the United States Supreme Court in *CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732 (1993). Further, there have been several lower court decisions interpreting the same.

Based upon said federal case, the Defendants have argued that the Plaintiff's claim that the Defendants were negligent under Indiana law for failing to maintain adequate warning devices at the Hendricks Street crossing was preempted by the Federal Railroad Safety Act of 1970 prior to the November 6, 1988 collision.

The issue presented to the United States Supreme Court in the *Easterwood* case was the extent to which the Federal Railroad Safety Act of 1970, as amended, and the regulations promulgated by the Secretary of Transportation pursuant to said statute, preempted the law of the State of Georgia.

In the *Easterwood* case, the Supreme Court held that the provisions of 23 CFR 646.214(b)(3) and (4), when applicable, do preempt state tort law as such regulations establish requirements as to the installation of particular warning

devices. The Supreme Court held "in short, for projects in which federal funds participate in the installation of warning devices, the secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The secretary's regulations, therefore, cover the subject matter of state law which, like the tort in law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings."

The Supreme Court further held that while the federal regulations do displace state's decision-making authority by requiring particular warning devices, the regulations did not apply to the facts of the *Easterwood* case because a plan to install such devices at the crossing at issue was shelved and the federal funds allocated for the project were diverted elsewhere.

Since the *Easterwood* decision, there is no question that 23 CFR 646.200 et seq. preempts state negligence law in the areas covered thereby. However, the issue which has divided the lower federal courts is what event triggers the preemption.

In *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864 (8th Cir. 1994), the Eighth Circuit Court of Appeals held that preemption occurs when all of the devices prescribed in the Federal Highway Administration's approved upgrade plan are installed and operating.

At the other end of the spectrum is a case from the United States Court of Appeals, Tenth Circuit. In *Hatfield v. Burlington Northern R. Co.*, 1 F.3d 1071 (10th Cir. 1993), the Court of Appeals, in addressing the preemption issue, stated: "Thus, the precise issue to be resolved here is whether 'federal-aid funds participated in installation of a warning device' prior to the collision involving Mr. Hatfield." The court determined that preemption could occur when engineering services are utilized in the project and these services are remunerated by federal funds.

The United States Seventh Circuit Court of Appeals, in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994), adopted a position somewhat in between the holdings of the Eighth and Tenth Circuits. In the *Shots* case, the Seventh Circuit Court of Appeals held that the Secretary of Transportation's determination of the devices to be installed, and not the completion of the installation itself, would trigger preemption. The Seventh Circuit Court of Appeals did not find that the plaintiffs' state law claim had been preempted in this case for reason that, although crossbucks had been installed with federal funds, the Secretary of Transportation had not prescribed the crossbucks or any other warning devices at the crossing at which the plaintiffs were injured. The court thus found that the Secretary of Transportation had not covered the relevant subject matter, and that therefore the Secretary of Transportation's regulations did not preempt the plaintiffs' state claim.

The Court further finds that the facts of a case decided by the Honorable William C. Lee, Judge of the United States District Court for the Northern District of Indiana, are very similar to the uncontested facts in this cause. In *Thiele v. Norfolk and Western Railway Company*, 873 F.Supp. 1240 (N.D. Ind. 1994), the plaintiff sued the defendant railroad company as a result of personal injuries sustained on March 6, 1992, when the defendant's train struck the left side of the plaintiff's vehicle at a railroad intersection in Yoder, Indiana. Among other things, the plaintiff alleged that the defendant had willfully and wantonly failed to modify the grade crossing warning devices after becoming aware of their inadequate nature.

In said decision, Judge Lee analyzed the *Easterwood* decision and its prodigies, and stated that the holding of the Eighth Circuit Court of Appeals in the *Malone* case was inconsistent with the holding of the Seventh Circuit Court of Appeals in the *Shots* case. Judge Lee further stated that the language of the *Easterwood* case clearly supports the holding

of the Seventh Circuit Court of Appeals in the *Shots* case in that it is the Secretary of Transportation's determination of the devices to be installed, not the completion of the installation itself, that triggers preemption.

This Court finds that Judge Lee has correctly stated the law as it pertains to the Plaintiff's state law claim in this cause. Further, in adopting the United States Seventh Circuit Court of Appeals' determination of preemption as enumerated in the *Shots* decision, and applying the same to the facts of this case, the Court finds that the United States Secretary of Transportation had covered the relevant subject matter of the Plaintiff's state law claim with regards to warning devices at the Hendricks Street crossing, and that federal law had preempted state law in August, 1988.

The Court therefore finds that there is no issue of fact unresolved with regards to the Plaintiff's claim of negligence on the part of the Defendants for failing to have proper warning devices at the Hendricks Street crossing where the accident occurred, as the Plaintiff's state law claim has been preempted by federal law, and therefore said claim must fail. Further, that the Defendants are entitled to a judgment as a matter of law on the issue of inadequate warning devices and that the Defendants' Motion for Partial Summary Judgment should be granted as to said issue.

IT IS THEREFORE ORDERED AND DECREED by the Court that the Defendants' Motion for Partial Summary Judgment as to the Plaintiff's claim that the Defendants failed to maintain a clear view of the railroad crossing is overruled and denied.

FURTHER ORDERED that the Defendants' Motion for Partial Summary Judgment as to the issue of improper warning devices is hereby granted and judgment is hereby entered for the Defendants, Grand Trunk Western Railroad Company and Richard Enos, and each of them, and against

the Plaintiff, Tamera Lee Kapitan, Special Administratrix of the Estate of Rudolph J. Kapitan, and the Plaintiff shall take nothing by way of her complaint against the Defendant on the issue of warning devices at said railroad crossing.

ORDERED THIS 13th DAY OF JULY, 1995.

/s/ E. Duane Daugherty,
E. DUANE DAUGHERTY, Judge
Jasper Circuit Court

KENNENTH J. ALLEN, Attorney at Law, 1109 Glendale Blvd., Valparaiso, IN 46383

ROBERT G. DEVETSKI, Attorney at Law, P.O. Box 11237, South Bend, IN 46634-0237

ROBERT BINGLE, Attorney at Law, 21st Floor, 33 North Dearborn Street, Chicago, IL 60602

## APPENDIX F

STATUTES

### 23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

### 23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings,

may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request

the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed

with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway [1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a

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[1] So in original. Probably should be "railroad-highway".

State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

**23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys**

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [1] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170; Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591.)

**49 U.S.C. § 20106. National uniformity of regulation**

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

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[1] So in original. Probably should have a comma inserted.

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(July 5, 1994, Pub.L. 103-272, § 1(e), 108 Stat. 866.)

## APPENDIX G

REGULATIONS

**23 C.F.R. § 646.214 Design.**

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices*, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

**23 C.F.R. § 646.216 General procedures.**

(a) *General.* Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) *Preliminary engineering and engineering services.* (1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) *Rights-of-way.* (1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*) and applicable FHWA right-of-way procedures in 23 CFR, Chapter I, Subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 *et. seq.*

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facility and which are provided solely for the benefit of the railroad.

(iii) Actual salvage value of the material recovered from the facility being replaced. Total credits to a project shall not be required in excess of the replacement cost of the facility.

(3) Where Federal funds participate in the cost of replacement right-of-way, there will be no charge to the project for the railroad's existing right-of-way being transferred to the State highway agency except when the value of the right-of-way being taken exceeds the value of the replacement right-of-way.

(d) *State-railroad agreements.* (1) Where construction of a Federal-aid project requires use of railroad properties or adjustments to railroad facilities, there shall be an agreement in writing between the State highway agency and the railroad company.

(2) The written agreement between the State and the railroad shall, as a minimum include the following, where applicable:

(i) The provisions of this subpart and of 23 CFR, Part 140, subpart I, incorporated by reference.

(ii) A detailed statement of the work to be performed by each party.

(iii) Method of payment (either actual cost or lump sum),

(iv) For projects which are not for the elimination of hazards of railroad-highway crossings, the extent to which the railroad is obligated to move or adjust its facilities at its own expense,

(v) The railroad's share of the project cost,

(vi) An itemized estimate of the cost of the work to be performed by the railroad,

(vii) Method to be used for performing the work, either by railroad forces or by contract,

(viii) Maintenance responsibility,

(ix) Form, duration, and amounts of any needed insurance,

(x) Appropriate reference to or identification of plans and specifications,

(xi) Statements defining the conditions under which the railroad will provide or require protective services during performance of the work, the type of protective services and the method of reimbursement to the railroad, and

(xii) Provisions regarding inspection of any recovered materials.

(3) On work to be performed by the railroad with its own forces and where the State highway agency and railroad agree, subject to approval by FHWA, an agreement providing for a lump sum payment in lieu of later determination of actual costs may be used for any of the following:

(i) Installation or improvement of grade crossing warning devices and/or grade crossing surfaces, regardless of cost, or

(ii) Any other eligible work where the estimated cost to the State of the proposed railroad work does not exceed $100,000 or

(iii) Where FHWA finds that the circumstances are such that this method of developing costs would be in the best interest of the public.

(4) Where the lump sum method of payment is used, periodic reviews and analyses of the railroad's methods and cost data used to develop lump sum estimates will be made.

(5) Master agreements between a State and a railroad on an areawide or statewide basis may be used. These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects. Supporting data for each project or group of projects must, when combined with the master agreement by reference, satisfy the provisions of § 646.216(d)(2).

(6) Official orders issued by regulatory agencies will be accepted in lieu of State-railroad agreements only where, together with supplementary written understandings between the State and the railroad, they include the items required by § 646.216(d)(2).

(7) In extraordinary cases where FHWA finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds, provided satisfactory commitments have been made with respect to construction, maintenance and the railroad share of project costs.

(e) *Authorizations.* (1) The costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation. Preliminary engineering and right-of-way

acquisition costs which are otherwise eligible, but incurred by a railroad prior to authorization by the FHWA, although not reimbursable, may be included as part of the railroad share of project cost where such a share is required.

(2) Prior to issuance of authorization by FHWA either to advertise the physical construction for bids or to proceed with force account construction for railroad work or for other construction affected by railroad work, the following must be accomplished:

(i) The plans, specifications and estimates must be approved by FHWA.

(ii) A proposed agreement between the State and railroad must be found satisfactory by FHWA. Before Federal funds may be used to reimburse the State for railroad costs the executed agreement must be approved by FHWA. However, cost for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings prior to the approval of the executed State-Railroad Agreement in accordance with 23 CFR 140.922(a) and § 646.218 of this part.

(iii) Adequate provisions must be made for any needed easements, right-of-way, temporary crossings for construction purposes or other property interests.

(iv) The pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract.

(3) In unusual cases, pending compliance with §646.216(e)(2)(ii), (iii) and (iv), authorization may be given by FHWA to advertise for bids for highway construction under conditions where a railroad grants a right-of-entry to its property as necessary to prosecute the physical construction.

(f) *Construction.* (1) Construction may be accomplished by:

(i) Railroad force account,

(ii) Contracting with the lowest qualified bidder based on appropriate solicitation,

(iii) Existing continuing contracts at reasonable costs, or

(iv) Contract without competitive bidding, for minor work, at reasonable costs.

(2) Reimbursement will not be made for any increased costs due to changes in plans:

(i) For the convenience of the contractor, or

(ii) Not approved by the State and FHWA.

(3) The State and FHWA shall be afforded a reasonable opportunity to inspect materials recovered by the railroad prior to disposal by sale or scrap. This requirement will be satisfied by the railroad giving written notice, or oral notice with prompt written confirmation, to the State of the time and place where the materials will be available for inspection. The giving of notice is the responsibility of the railroad, and it may be held accountable for full value of materials disposed of without notice.

(4) In addition to normal construction costs, the following construction costs are eligible for participation with Federal-aid funds when approved by the State and FHWA:

(i) The cost of maintaining temporary facilities of a railroad company required by and during the highway construction to the extent that such costs exceed the documented normal cost of maintaining the permanent facilities.

(ii) The cost of stage or extended construction involving grade corrections and/or slope stabilization for permanent tracks of a railroad which are required to be

relocated on new grade by the highway construction. Stage or extended construction will be approved by FHWA only when documentation submitted by the State establishes the proposed method of construction to be the only practical method and that the cost of the extended construction within the period specified is estimated to be less than the cost of any practicable alternate procedure.

(iii) The cost of restoring the company's service by adjustments of existing facilities away from the project site, in lieu of and not to exceed the cost of replacing, adjusting or relocating facilities at the project site.

(iv) The cost of an addition or improvement to an existing railroad facility which is required by the highway construction.

[40 FR 16059, April 9, 1975, as amended at 40 FR 29712, July 15, 1975; 47 FR 33956, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

## APPENDIX H

TRANSCRIPT EXCERPT

[35] [000981] on November 8, 1988, and that is the relevant time frame. That's our position.

THE COURT: The Court will take the matter under advisement.

MR. ALLEN: Your Honor, may I . . .

THE COURT: No, I don't want any further. . .

MR. ALLEN: . . . just be heard . . . one . . . one sentence on that issue?

THE COURT: No, I've . . . I've heard all the argument I need to on those motions. Let's move on. Let's take up the Defendant's Motion to Consider (sic) Trial Pending U.S. Supreme Court Decision.

MS. KENYON: Your Honor, I filed that motion based upon the fact that at the core of the Plaintiff's claims in this case, is whether or not their state tort claims are preempted under federal law. This is another issue that was brought up earlier in this case. It went upon appeal. What has happened is both at the state appellate and supreme court levels, as well as at the federal circuit court levels, contrary and conflicting decisions have been handed down. As a result, on this very question of preemption, and whether or not it occurs once funding has been awarded for a particular crossing upgrade, or whether it is not relevant until after the installation and operation of the lights and gates at the crossing, or whether in fact preemption attaches at some [36] [000982] other point in time, is a question that now United States Supreme is going to decide based upon its granting cert. in the *Shanklin* case, a case coming out of the Sixth Circuit Court of Appeals. My understanding, based upon reviewing the Supreme Court website maintained by Northwestern University Law School is that the United States Supreme Court has scheduled this question for oral argument on March 1 of this year, just about a month and a week and a half or so away. That would

indicate, probably in terms of time, that there might be a decision on that in six to eight months, which at this point in this case doesn't seem to be a lot of time, given the fact that this case was filed in 1988 . . . I'm sorry, filed in '90 based upon a 1988 occurrence. In the interest of judicial economy and not dealing with this claim until the Supreme Court has spoken on it, I filed a motion to continue.

THE COURT: The Defendants' Motion to Continue Trial is overruled and denied, and we'll proceed with the trial of the cause.

Let's go to Defendants' Motion to Exclude Dr. Berg, though I suspect I've heard some of that argument already.

MS. KENYON: That's correct, Your Honor, you have. The motion to exclude Dr. Berg is based largely on the mandates of *Daubert v. Merrell Dow Pharmaceuticals,* and you already, I think, probably heard enough with regard to his

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